

STATE OF MICHIGAN
COURT OF APPEALS

W. FRANK TIMMONS d/b/a TIMMONS
LANDSCAPING,

Plaintiff-Appellant,

v

SHARON BONE and GROUNDS GROOMING,
INC.,

Defendants-Appellees,

and

CITY OF FLINT, STEVEN WALLER, TONY
GOLDEN, JAMES MAKOKHA and CHARLES
WINFREY,

Defendants.

Before: Gage, P.J., and Griffin and G. S. Buth*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants-appellees' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

* Circuit judge, sitting on the Court of Appeals by assignment.

The elements of tortious interference with business relations are (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of that business relationship or expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) damage to the plaintiff. *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). A valid business expectancy is one that is reasonably likely or probable, not merely hoped for. *First Public Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001). The third element requires proof of "the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's . . . business relationship." *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). If the plaintiff relies on the intentional doing of a lawful act done with malice and unjustified in law, he must demonstrate, with specificity, affirmative acts by the defendant that corroborate the unlawful purpose or improper motive of the interference. *Feldman, supra* at 369-370; *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

Defendants contend that plaintiff did not have a valid business expectancy because he did not have the equipment necessary to be awarded the contracts. The bid specifications provided that the city could defer awarding contracts after opening the bids to investigate the bidders' qualifications. The city notified plaintiff each year that it would be out to inspect his equipment. In 1996, plaintiff lacked the requisite number of mowers that met the city's specifications regarding horsepower and safety equipment. Plaintiff contends that Bone was responsible for the city adopting those requirements. However, only evidence admissible at trial may be considered in determining whether a genuine issue of fact exists, *Cox v Dearborn Heights*, 210 Mich App 389, 397-398; 534 NW2d 135 (1995). The only evidence offered to establish that Bone was responsible for the equipment requirements was the hearsay statements of Greg McKenzie. However, plaintiff has not shown that those statements are admissible under any rule of evidence. Plaintiff contends that it was enough that he showed the inspector that he had an agreement to purchase the additional equipment. Apparently the city would have accepted signed lease agreements for new tractors, but all plaintiff had was a price quotation. Because plaintiff did not meet the minimum qualifications for obtaining the 1996 citywide contract, he failed to establish with admissible evidence that he had a valid business expectancy with the city.

The plaintiff's situation for the 1997 contracts was much the same. In addition to the fact that he lacked the five tractor mowers necessary to qualify for the citywide contract, he lacked even the two tractor mowers necessary to qualify for the DCD contract. While plaintiff makes much of the fact that Waller apparently told the city council in 1996 that defendants' tractor mowers were OSHA certified when there was no such thing as OSHA certification, neither the 1997 contracts nor any city officials required that plaintiff have equipment that was OSHA certified. Rather, the city specified that the tractors be equipped with ropes, that mowers be equipped with guards and chain shields, and that he comply with the department of labor safety standards. The evidence showed that two of the three mowers did not meet those requirements. Because plaintiff did not meet the minimum qualifications for obtaining the 1997 contracts, he failed to prove that he had a valid business expectancy with the city. Therefore, the trial court did not err in granting defendants' motion.

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth